

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DONALD C. FLORY,)
Petitioner,)
v.)
GARY FLEMING,)
Respondent.)

)

) CASE NO. C04-2155-RSL
)

) REPORT AND
RECOMMENDATION
)

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Donald C. Flory is a state prisoner currently incarcerated at the Washington State Reformatory in Monroe, Washington. He seeks relief under 28 U.S.C. § 2254 from the life sentence imposed following his April, 1983 conviction in King County Superior Court. In lieu of filing an answer, Respondent filed a motion to dismiss on grounds that Petitioner's federal habeas corpus petition is time-barred under 28 U.S.C. § 2255(d)(1)(D). Petitioner filed a response in opposition to the motion (Dkt. #20) and Respondent filed a reply (Dkt. #23). After careful consideration of the entire record, this Court recommends that Respondent's motion to dismiss should be GRANTED.

II. PROCEDURAL HISTORY

On March 15, 1983, following a 5-day jury trial, Petitioner was convicted of

REPORT AND RECOMMENDATION

1 murder in the first degree while armed with a deadly weapon.¹ He was 17 years old at the
2 time of the crime. Petitioner was sentenced to life in prison on April 13, 1983. Dkt.
3 #14, Ex. 1.

4 A. Direct Appeal

5 On February 2, 1984, Petitioner appealed his conviction to the Washington Court
6 of Appeals, Div. I, claiming that the trial court erred by admitting evidence concerning
7 comparison of microscopic hair samples. *Id.* at Ex. 18, Attachment II. The court of
8 appeals affirmed his conviction in an unpublished opinion on November 11, 1984, and
9 issued its Mandate on March 1, 1985. *Id.*

10 B. Collateral Proceedings

11 On August 25, 1989, Petitioner filed a *pro se* Personal Restraint Petition (“PRP”)
12 in the court of appeals. Dkt. #14, Ex. 17. He claimed there was insufficient evidence to
13 find him guilty of first degree murder beyond a reasonable doubt. On April 11, 1990, the
14 court of appeals dismissed the PRP, concluding that Petitioner failed to establish actual
15 prejudice based on error of constitutional magnitude. *Id.* at Ex. 19. Petitioner’s motion
16 for discretionary review in the Supreme Court of Washington was denied by the Court
17 Commissioner on August 14, 1990. *Id.* at Ex. 21.

18 On April 29, 1999, Petitioner, represented by counsel, filed a second PRP in the
19 court of appeals. *Id.* at 22. Petitioner claimed that the Indeterminate Sentence Review
20 Board (“ISRB”): 1) incorrectly determined his standard range; 2) denied him due process
21

22 _____
23 ¹Petitioner was also convicted under a separate cause number on stipulated facts for theft
24 in the first degree and burglary in the second degree. Dkt. #14, Ex. 5. He was sentenced to ten
25 years on each count. *Id.* at Ex. 6. Although the Board of Prison Terms and Paroles initially set
26 his minimum term on each of these counts at 45 months, the Board later redetermined the
minimum term to be one day, concurrent. *See Id.* at Exs. 8, 9.

1 when it “reviewed” its reasons for imposing an exceptional minimum term without giving
2 him notice and opportunity to be heard; 3) imposed an exceptional term without adequate
3 reasons; and 4) abused its discretion by failing to consider mitigating factors. *Id.* The
4 court of appeals dismissed the PRP on December 12, 1999. Dkt. #14, Ex. 25. Petitioner
5 filed a motion for discretionary review in the supreme court (*Id.* at Ex. 26), which was
6 denied by the Court Commissioner on April 20, 2000 (*Id.* at Ex. 28). On June 6, 2000,
7 the supreme court denied Petitioner’s motion to modify the commissioner’s ruling. *Id.* at
8 Ex. 30. A Certificate of Finality was issued to King County Superior Court on July 7,
9 2000. *Id.* at Ex. 31.

10 On July 23, 2001, Petitioner filed a third PRP in which he claimed that the ISRB’s
11 action in resetting his minimum term was unconstitutionally retroactive and it
12 disadvantaged him. *Id.* at Ex. 32. The court of appeals dismissed the PRP on September
13 3, 2003. *Id.* at Ex. 37. In October, 2003, the supreme court commissioner denied
14 Petitioner’s motion for discretionary review. *Id.* at Ex. 39. Thereafter, in February,
15 2004, the supreme court denied Petitioner’s motion for extension of time to file a motion
16 to modify the commissioner’s ruling. *Id.* at Ex. 42. A Certificate of Finality was issued
17 on February 24, 2004. *Id.* at Ex. 43.

18 C. Actions by the ISRB

19 In 1989, the Legislature adopted Substitute House Bill 1457 (1989), codified at
20 section 9.95.116 of the Washington Revised Code, which directs the ISRB to “fix the duration of
21 confinement for persons committed to the custody of the department of corrections under a
22 mandatory life sentence for a crime or crimes committed before July 1, 1984.” *See* RCW
23 9.95.116(1). On October 15, 1990, the ISRB requested a minimum term recommendation
24 for petitioner Flory from the sentencing judge and the prosecuting attorney. *Id.* at Ex. 10,

1 11. Judge Bobbe Bridge² recommended a minimum term of 75 years, and the prosecuting
2 attorney recommended an exceptional minimum term of 120 years due to defendant's
3 display of deliberate and extreme cruelty to the victim. *Id.* at Ex. 12.

4 The hearing to fix the duration of Petitioners confinement was held on February
5 12, 1991. The ISRB based its decision on its consideration of all the information
6 available regarding the offense, including Petitioner's prior criminal history, the adjusted
7 Sentencing Reform Act (SRA) ranges, the Judge's and the Prosecutor's recommendation,
8 victim information, and all other information required by SHB 1457. *Id.* at Ex. 13,
9 Decisions and Reasons. Additionally, the Board interviewed Petitioner during the
10 hearing and he presented a letter dated January 18, 1991, in which he challenged the
11 accuracy of the Prosecutor's input. He also challenged his offender score and the last
12 sentence in the Prosecutor's updated recommendation. *Id.* The ISRB set Petitioner's
13 minimum term on the first degree murder conviction at 510 months, which is two times
14 the low side of the SRA guideline range of 255-341 months. *Id.*

15 In January, 1992, the ISRB conducted an administrative review of its decision.
16 See Dkt. 14, Ex. 14 - Murder 1 Decision Review. In reviewing the dictated aggravating
17 reasons for Petitioner's minimum term, the Board noted that "[t]he reasons cited for the
18 term kind of run together in narrative form." *Id.* It also identified two additional reasons
19 – violation of the sanctity of the home and vulnerability by size (90 lb.) – that would
20 help support the aggravated sentence. *Id.* Although the Board concluded that revised
21 dictation was necessary, it decided to maintain Petitioner's 510-month minimum term.
22 *Id.* Accordingly, on January 31, 1992, the ISRB issued an amended Decisions and

23
24 ²The sentencing judge, Judge William C. Goodloe (Dkt. 14, Ex. 1), was no longer on the
King County Superior Court bench.
25

1 Reasons, in which it clearly enumerated the compelling aggravating facts that mandated a
 2 duration of confinement above the SRA guideline range, including the two additional
 3 reasons identified in the administrative review. *Id.* at Ex. 15.

4 Thereafter, the ISRB conducted administrative progress reviews regarding
 5 Petitioner every two years. *Id.* at 16, Admin. Bd. Decisions from February 18, 1993, to
 6 March 14, 2001. The Board's March, 1997 decision specifically states, "Minimum term
 7 reviewed - no change in minimum term." *Id.* The decision also indicates that petitioner's
 8 next administrative progress review would be scheduled for February, 2003.

9 Petitioner filed the present petition for writ of habeas corpus pursuant to 28 U.S.C.
 10 § 2254 on October 15, 2004.

11 **III. GROUNDS FOR RELIEF**

12 Petitioner presents the following three claims, and the facts upon which they are
 13 supported, for review in his federal habeas petition:

14 **Ground One: Ex Post Facto.** Petitioner was sentenced to 20
 15 years - life for murder 1 on 4-13-1983. This was for a crime
 16 committed on 11-4-82 when petitioner was 17. His initial ERD was
 17 1998. In 1989, SHB 1447 (sic)³ was passed. In 1991, the ISRB, per
 18 SHB 1447 (sic), increased his sentence to 42.5 years to life, making
 19 his ERD now 2011. Petitioner has never had a parole hearing.

20 **Ground Two: Due Process.** Same facts as Ground One.
 21 Expectation of a parole hearing is a fundamental liberty interest.
 22 Petitioner has never had a parole hearing. Board didn't consider all
 23 factors.

24 **Ground Three: Equal Protection.** SHB 1447 (sic) violates
 25 equal protection rights because some inmates do both a pre & post-
 26 SRA sentence, getting the worst of both. Post-SRA inmates are
 27 treated better than pre-SRA ones. Pre-SRA inmates get the [sic] no
 28 guarantee of ever having a parole hearing combined with the longer
 29 sentences of SRA inmates.

30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100
 101
 102
 103
 104
 105
 106
 107
 108
 109
 110
 111
 112
 113
 114
 115
 116
 117
 118
 119
 120
 121
 122
 123
 124
 125
 126
 127
 128
 129
 130
 131
 132
 133
 134
 135
 136
 137
 138
 139
 140
 141
 142
 143
 144
 145
 146
 147
 148
 149
 150
 151
 152
 153
 154
 155
 156
 157
 158
 159
 160
 161
 162
 163
 164
 165
 166
 167
 168
 169
 170
 171
 172
 173
 174
 175
 176
 177
 178
 179
 180
 181
 182
 183
 184
 185
 186
 187
 188
 189
 190
 191
 192
 193
 194
 195
 196
 197
 198
 199
 200
 201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300
 301
 302
 303
 304
 305
 306
 307
 308
 309
 310
 311
 312
 313
 314
 315
 316
 317
 318
 319
 320
 321
 322
 323
 324
 325
 326
 327
 328
 329
 330
 331
 332
 333
 334
 335
 336
 337
 338
 339
 340
 341
 342
 343
 344
 345
 346
 347
 348
 349
 350
 351
 352
 353
 354
 355
 356
 357
 358
 359
 360
 361
 362
 363
 364
 365
 366
 367
 368
 369
 370
 371
 372
 373
 374
 375
 376
 377
 378
 379
 380
 381
 382
 383
 384
 385
 386
 387
 388
 389
 390
 391
 392
 393
 394
 395
 396
 397
 398
 399
 400
 401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500
 501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525
 526
 527
 528
 529
 530
 531
 532
 533
 534
 535
 536
 537
 538
 539
 540
 541
 542
 543
 544
 545
 546
 547
 548
 549
 550
 551
 552
 553
 554
 555
 556
 557
 558
 559
 560
 561
 562
 563
 564
 565
 566
 567
 568
 569
 570
 571
 572
 573
 574
 575
 576
 577
 578
 579
 580
 581
 582
 583
 584
 585
 586
 587
 588
 589
 590
 591
 592
 593
 594
 595
 596
 597
 598
 599
 600
 601
 602
 603
 604
 605
 606
 607
 608
 609
 610
 611
 612
 613
 614
 615
 616
 617
 618
 619
 620
 621
 622
 623
 624
 625
 626
 627
 628
 629
 630
 631
 632
 633
 634
 635
 636
 637
 638
 639
 640
 641
 642
 643
 644
 645
 646
 647
 648
 649
 650
 651
 652
 653
 654
 655
 656
 657
 658
 659
 660
 661
 662
 663
 664
 665
 666
 667
 668
 669
 670
 671
 672
 673
 674
 675
 676
 677
 678
 679
 680
 681
 682
 683
 684
 685
 686
 687
 688
 689
 690
 691
 692
 693
 694
 695
 696
 697
 698
 699
 700
 701
 702
 703
 704
 705
 706
 707
 708
 709
 710
 711
 712
 713
 714
 715
 716
 717
 718
 719
 720
 721
 722
 723
 724
 725
 726
 727
 728
 729
 730
 731
 732
 733
 734
 735
 736
 737
 738
 739
 740
 741
 742
 743
 744
 745
 746
 747
 748
 749
 750
 751
 752
 753
 754
 755
 756
 757
 758
 759
 760
 761
 762
 763
 764
 765
 766
 767
 768
 769
 770
 771
 772
 773
 774
 775
 776
 777
 778
 779
 780
 781
 782
 783
 784
 785
 786
 787
 788
 789
 790
 791
 792
 793
 794
 795
 796
 797
 798
 799
 800
 801
 802
 803
 804
 805
 806
 807
 808
 809
 810
 811
 812
 813
 814
 815
 816
 817
 818
 819
 820
 821
 822
 823
 824
 825
 826
 827
 828
 829
 830
 831
 832
 833
 834
 835
 836
 837
 838
 839
 840
 841
 842
 843
 844
 845
 846
 847
 848
 849
 850
 851
 852
 853
 854
 855
 856
 857
 858
 859
 860
 861
 862
 863
 864
 865
 866
 867
 868
 869
 870
 871
 872
 873
 874
 875
 876
 877
 878
 879
 880
 881
 882
 883
 884
 885
 886
 887
 888
 889
 890
 891
 892
 893
 894
 895
 896
 897
 898
 899
 900
 901
 902
 903
 904
 905
 906
 907
 908
 909
 910
 911
 912
 913
 914
 915
 916
 917
 918
 919
 920
 921
 922
 923
 924
 925
 926
 927
 928
 929
 930
 931
 932
 933
 934
 935
 936
 937
 938
 939
 940
 941
 942
 943
 944
 945
 946
 947
 948
 949
 950
 951
 952
 953
 954
 955
 956
 957
 958
 959
 960
 961
 962
 963
 964
 965
 966
 967
 968
 969
 970
 971
 972
 973
 974
 975
 976
 977
 978
 979
 980
 981
 982
 983
 984
 985
 986
 987
 988
 989
 990
 991
 992
 993
 994
 995
 996
 997
 998
 999
 1000
 1001
 1002
 1003
 1004
 1005
 1006
 1007
 1008
 1009
 10010
 10011
 10012
 10013
 10014
 10015
 10016
 10017
 10018
 10019
 10020
 10021
 10022
 10023
 10024
 10025
 10026
 10027
 10028
 10029
 10030
 10031
 10032
 10033
 10034
 10035
 10036
 10037
 10038
 10039
 10040
 10041
 10042
 10043
 10044
 10045
 10046
 10047
 10048
 10049
 10050
 10051
 10052
 10053
 10054
 10055
 10056
 10057
 10058
 10059
 10060
 10061
 10062
 10063
 10064
 10065
 10066
 10067
 10068
 10069
 10070
 10071
 10072
 10073
 10074
 10075
 10076
 10077
 10078
 10079
 10080
 10081
 10082
 10083
 10084
 10085
 10086
 10087
 10088
 10089
 10090
 10091
 10092
 10093
 10094
 10095
 10096
 10097
 10098
 10099
 100100
 100101
 100102
 100103
 100104
 100105
 100106
 100107
 100108
 100109
 100110
 100111
 100112
 100113
 100114
 100115
 100116
 100117
 100118
 100119
 100120
 100121
 100122
 100123
 100124
 100125
 100126
 100127
 100128
 100129
 100130
 100131
 100132
 100133
 100134
 100135
 100136
 100137
 100138
 100139
 100140
 100141
 100142
 100143
 100144
 100145
 100146
 100147
 100148
 100149
 100150
 100151
 100152
 100153
 100154
 100155
 100156
 100157
 100158
 100159
 100160
 100161
 100162
 100163
 100164
 100165
 100166
 100167
 100168
 100169
 100170
 100171
 100172
 100173
 100174
 100175
 100176
 100177
 100178
 100179
 100180
 100181
 100182
 100183
 100184
 100185
 100186
 100187
 100188
 100189
 100190
 100191
 100192
 100193
 100194
 100195
 100196
 100197
 100198
 100199
 100200
 100201
 100202
 100203
 100204
 100205
 100206
 100207
 100208
 100209
 100210
 100211
 100212
 100213
 100214
 100215
 100216
 100217
 100218
 100219
 100220
 100221
 100222
 100223
 100224
 100225
 100226
 100227
 100228
 100229
 100230
 100231
 100232
 100233
 100234
 100235
 100236
 100237
 100238
 100239
 100240
 100241
 100242
 100243
 100244
 100245
 100246
 100247
 100248
 100249
 100250
 100251
 100252
 100253
 100254
 100255
 100256
 100257
 100258
 100259
 100260
 100261
 100262
 100263
 100264
 100265
 100266
 100267
 100268
 100269
 100270
 100271
 100272
 100273
 100274
 100275
 100276
 100277
 100278
 100279
 100280
 100281
 100282
 100283
 100284
 100285
 100286
 100287
 100288
 100289
 100290
 100291
 100292
 100293
 100294
 100295
 100296
 100297
 100298
 100299
 100300
 100301
 100302
 100303
 100304
 100305
 100306
 100307
 100308
 100309
 100310
 100311
 100312
 100313
 100314
 100315
 100316
 100317
 100318
 100319
 100320
 100321
 100322
 100323
 100324
 100325
 100326
 100327
 100328
 100329
 100330
 100331
 100332
 100333
 100334
 100335
 100336
 100337
 100338
 100339
 100340
 100341
 100342
 100343
 100344
 100345
 100346
 100347
 100348
 100349
 100350
 100351
 100352
 100353
 100354
 100355
 100356
 100357
 100358
 100359
 100360
 100361
 100362
 100363
 100364
 100365
 100366
 100367
 100368
 100369
 100370
 100371
 100372
 100373
 100374
 10

III. DISCUSSION

In his motion to dismiss⁴, Respondent argues that Petitioner’s habeas petition is time-barred based on 28 U.S.C. § 2244(d)(1)(D). The Antiterrorism and Effective Death Penalty Act of 1996 (the “AEDPA”) imposes a one-year statute of limitations on habeas corpus petitions filed by state prisoners in federal court. 28 U.S.C. § 2244(d)(1); *see also* *Shelby v. Bartlett*, 391 F.3d 1061, 1063 (2004) (holding that § 2244’s one-year limitations period applies to all habeas petitions even if the petition challenges a pertinent administrative decision rather than a state court judgment). The AEDPA also provides that the one-year statute of limitations is tolled for “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2).

Moreover, for state prisoners, like Petitioner, whose convictions became final prior to AEDPA's enactment, AEDPA's one year statute of limitations began to run on April 25, 1996, the day after AEDPA was enacted. *Malcolm v. Payne*, 281 F.3d 951, 955 (9th Cir. 2002) (citing *Patterson v. Stewart*, 251 F.3d 1253 (9th Cir. 2001)). Thus, counting forward one year, Petitioner had until April 24, 1997, to file his federal habeas petition, unless the statute of limitations was statutorily or equitably tolled. Petitioner Flory's federal habeas petition was filed on October 15, 2004, almost seven and one-half years after the one-year limitations period had run. Therefore, his habeas petition is timely

⁴Petitioner's contention that Respondent should be ordered to file an Answer and then proceed by way of Summary Judgment to Dismiss is without merit. Respondent filed a Statement of Cause for Filing Dispositive Motion in Lieu of Answer (Dkt. # 14) along with his motion to dismiss that satisfies provision 2 of the Order Directing Service and Return of the § 2254 habeas petition (Dkt. #3), which states in pertinent part, “[t]he Respondent shall not file a dispositive motion in place of an Answer without first showing cause as to why an Answer is inadequate.”

1 only if his state court petitions tolled AEDPA's statute of limitations for all but 365 days
 2 or less between the date on which the statute of limitations began to run and the filing of
 3 his federal habeas petition.

4 A. Statutory Tolling

5 Under § 2244(d)(1)(D), the one-year limitations period shall run from "the date on
 6 which the factual predicate of the claim or claims presented could have been discovered
 7 through the exercise of due diligence." Respondent argues that Flory's habeas petition is
 8 time-barred under § 2244(d)(1)(D) because: (1) all three of his habeas claims challenge a
 9 February 1991 action of the Board; (2) he did not file a federal habeas petition
 10 challenging that 1991 Board action until his present habeas petition, and (3) he knew of
 11 the factual predicate of his current grounds for relief as of February 1991.

12 However, Petitioner argues that the factual predicate of his claims is the ISRB's
 13 failure to grant him a parole hearing, and he asserts that an ISRB letter dated March 14,
 14 2001 (Decl. of Pl.'s Counsel, Dkt. #21, Ex. A-1) was the last factual predicate before he
 15 filed a PRP in July, 2001, which tolled the statute of limitations for two and one-half
 16 years. Petitioner contends that his habeas petition was filed within the 1-year time limit
 17 because only nine months of untolled time⁵ elapsed between the factual predicate for his
 18 claims and the filing of his federal habeas petition.

19 This Court's review of the record reveals no facts that support Petitioner's
 20 assertion that the ISRB's March, 2001 letter⁶ is the factual predicate for his habeas

21 ⁵Petitioner calculated this total on the basis of 4 months between the factual predicate
 22 and the 2001 PRP plus 5 months between the conclusion of the PRP and the filing of his
 23 habeas petition).

24 ⁶This letter from the ISRB to the Associate Superintendent, Classification and Treatment
 25 at the Washington State Reformatory simply indicates that the Board conducted its "February

1 claims. Instead, as set out in Section III above, Petitioner's habeas claims plainly
2 identifies as supporting facts for his claims the ISRB's 1991 action of setting
3 Petitioner's minimum term of confinement at 42.5 years to life, pursuant to SHB 1457.
4 Dkt. #1 at 5-6. Additionally, fact summaries in the Fact Supplement to Petitioner's
5 habeas petition (Dkt. #1) and the Memorandum in Support of Petitioner for Habeas
6 Corpus (Dkt. #11 at p. 9), state that “[a]s a result of this redetermination [by the ISRB],
7 Mr. Flory has not received one parole hearing.” Significantly, as noted by Respondent,
8 neither the habeas petition nor its supporting pleadings mention the ISRB's March, 2001
9 letter as a supporting fact for Petitioner's claims.

10 In light of these facts, I conclude that the ISRB's action on February 12, 1991,
11 setting the duration of Petitioner's confinement as required by SHB 1457 was the factual
12 predicate for his habeas claims. Petitioner could have discovered this fact with the
13 exercise of due diligence when the ISRB issued its Decision and Reasons after the
14 hearing in February, 1991 (Dkt. #14, Ex. 13), or, at the latest, when the ISRB amended
15 the Decisions and Reasons in January, 1992 (Dkt. #14, Ex. 15). Thus, none of
16 Petitioner's three PRP's tolled the one-year limitations period that began to run from the
17 date this factual predicate could have been discovered because Petitioner's first PRP was
18 filed and completed before the ISRB's 1991 action, and his second and third PRP's were
19 filed in 1999 and 2001 respectively, well after both the one-year period under §
20 2244(d)(1)(D) and after April 24, 1997.

21 **B. Equitable Tolling**

22 The Ninth Circuit permits equitable tolling of AEDPA's limitations period “only if

23
24 2001 Administrative Progress Review” regarding Petitioner Flory and it notes that the next action
is to “Schedule February 2003 Administrative Progress Review.”

25 **REPORT AND RECOMMENDATION**

extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998) (en banc) (citing *Alvarez-Machain v. United States*, 107 F.3d 696, 701 9th Cir. 1996), *cert. denied*, 522 U.S. 814, 118 S.Ct. 60, 139 L.Ed.2d 23 (1997)); *Calderon v. United States Dist. Ct. (Beeler)*, 128 F.3d 1283, 1288-89 (9th Cir. 1997). When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate. *See Calderon (Kelly)*, 163 F.3d at 541; *Calderon (Beeler)*, 128 F.3d at 1288-89. In the present case, Petitioner makes no showing that he is entitled to equitable tolling.

Because Petitioner has filed his federal habeas petition outside the AEDPA statute of limitations period, and because he has not demonstrated that he is entitled to statutory or equitable tolling, the undersigned recommends that his federal habeas petition should be dismissed as time-barred.

IV. CONCLUSION

For the reasons stated above, I recommend that Respondent's motion to dismiss (Dkt. #15) be GRANTED, thereby denying Petitioner's § 2254 habeas petition (Dkt. #1) and dismissing this action, with prejudice. A proposed order accompanies this Report and Recommendation.

DATED this 25th day of August, 2005.



Monica J. Benton
United States Magistrate Judge